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No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 2000

SEAMAN RECRUIT ROBERT B. OGREN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

CHARLES C. HALE
Major, U.S. Marine Corps
Counsel of Record

M. ERIC EVERSOLE
Lieutenant
Judge Advocate General's Corps
U.S. Navy

C.M. ALLEN
Captain
U.S. Marine Corps

Navy-Marine Corps Appellate
Defense Division
716 Sicard St. SE, ste. 1000
Washington Navy Yard, D.C. 20347
(202) 685-7290

52 pp

QUESTION PRESENTED

WHETHER LANGUAGE THAT APPEARS TO THREATEN THE PRESIDENT UNDER 18 U.S.C. § 871 SHOULD BE TESTED FOR WILLFULNESS UNDER A REASONABLY FORESEEABLE CONSEQUENCES TEST CONTRARY TO THE WILLFUL MENS REA INTENDED BY CONGRESS?

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Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Seaman Recruit Robert B. Ogren, U.S. Navy, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces, 54 M.J. 481, (C.A.A.F. 2000), is located at Appendix A (1a-17a). The opinion of the United States Navy-Marine Corps Court of Criminal Appeals, 52 M.J. 528 (N-M. Ct. Crim. App. 1999) is located at Appendix B (App. 18a-23a).

JURISDICTION

The CAAF affirmed Petitioner's conviction on June 2, 2001. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

STATUTE INVOLVED

18 U.S.C. § 871, assimilated under Article 134, of the Uniform Code of Military Justice, [hereinafter §871], provides:

> Who ever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office of by any letter carrier, any letter, paper, writing, print missive, or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in order of succession to the office of the President of the United States, or President or knowing and willfully otherwise makes any such threat against the President, President-elect, Vice President, Vice President-elect, shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

I. Facts

Petitioner was a "problem confinee," who suffered from a personality disorder. For almost two days the Petitioner had been beating on his cell and ranting about his superiors from the Admiral and President on down. [App. A at 3a]. The Petitioner had said he was going to "shove a gun up the President's ass and blow his fucking brains out." The Brig Petty Officer asked "which president?" This resulted in the Petitioner responding "Clinton Man. I'm going to find Clinton and blow his fucking brains out." [App A at 4a]. The brig staff contacted the Secret Service to interview the Petitioner. Petitioner cooperated with the Secret Service agent, and swore out for the Secret Service agent a written apology to the President for his comments. The Petitioner after the interview "pretty much quieted down." [App A at 4a-5a]. As Chief Sulia testified, "someone finally called his bluff." Record at 70.

II. Proceedings Below

A General Court-Martial convicted Petitioner of several offenses including a violation of 18 U.S.C. §871, "Threats Against the President", assimilated under Article 134 of the Uniform Code of Military Justice. The Military Judge sentenced Petitioner to 12 months confinement, forfeiture of $500.00 pay per month for 12 months and a dishonorable discharge. In accordance with a pretrial agreement, the convening authority suspended confinement in excess of 200 days for 12 months.

The Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence. [App. 18a-41a]. This was the first time a military appellate court addressed the interpretation of 18 U.S.C. §871. The CAAF affirmed Petitioner's conviction on June 2, 2001. [App. A 1a-17a].

REASONS FOR GRANTING THE PETITION

A.

The lower court's adoption of the objective test to determine if a willful threat has been made against the President undermines the Congressional intent to avoid a technical offense and this Court's disfavor for criminal statutes that require no mens rea.

Congress added the willful element to ensure those who do "things thoughtlessly" were not unnecessarily convicted technical violations of §871. 53 Con. Rec. 9378; [App A at 5a, 12a]. Despite its recognition of this fact, the lower court joined the majority of other Federal Circuits and adopted the objective test. The objective test tests the willfulness element by the reasonably foreseeable consequences of the words uttered, regardless of the speaker's intent. [App A at 9a]. Justice Marshall cited Representative Volstead's comments during the debate over this statute that "the word willfully adds an intention to threaten and distinguishes a case [in which the defendant does not intend to convey any threat]. *United States v. Rogers*, 422 U.S. 35, 44-45 (1975) (Marshall J. concurring); citing 53 Cong. Rec at 9377-79.

In light of this Court's decisions in *United States v. Staples*, 511 U.S. 600, 615-616 (1994); *United States v.*

Liparota, 471 U.S. 419, 426 (1985) holding that, criminal offenses requiring no *mens rea* have a generally disfavored status, the objective test adopted by the lower court is in error. [App A. at 11a]. In *United States v. Watts*, 394 U.S. 705 (1969) this Court expressed "grave doubts" with the adoption of the objective test of the statute that considers the *apparent* rather than the *actual* intent of the speaker. *Id.* at 707, 708. Representatives Volstead's and Webb's comments during the debate on the legislation that "Without the requirement of willfulness a person might innocently, without intention to convey a threat at all ... be guilty." "If you make it a mere technical offense, you do not give him much of a chance to answer when he comes before a court or jury." 53 Cong. Rec. at 9377-79. The prosecutor's charging of this case demonstrates that Justice Marshall's concern that there will be "mischief in future prosecutions brought under §871" by those Federal Circuits adopting the objective test has proven true. *Rogers*, 422 U.S. at 48 (Marshall J. concurring).

B.

The Federal Circuits have split as to the application of the proper legal analysis (objective versus subjective) for what constitutes a willful true threat against the President.

Although it adopted the objective test the lower court acknowledged the division among the Federal Circuits as to whether the test for willful conduct is objective or subjective. [App. A at 8a]. This Court also recognizes the split between the Circuits. *Watts,* 394 U.S. at 707. The lower court struggled in determining whether the Petitioner's statement must reflect an apparent intent to threaten (objective test) or an actual intent (subjective test) before adopting the objective test. [App. A at 11a].

The majority of Federal Circuits have adopted an objective test of the statute, emphasizing that an intention to carry out the threat is not required under §871.[1] The Fourth and Eighth Circuits have adopted or applied the "subjective test" to determine what is a willfully made true threat under §871. The "subjective test" considers the actual intent of the person and prevents §871 from becoming simply a negligence statute. The Fourth Circuit noted there is no danger to the President's safety from one who utters a threat and has no intent to actually do what he threatens. *United States v. Patillo*, 431 F.2d 293, 297-298 (4th Cir.1970); *United States v. Frederickson*, 601 F.2d 1358, 1363 (8th Cir. 1979). "Simply to convict because a reasonably prudent man would expect his hearers to take his threat seriously is to impose an unduly stringent standard in this sensitive area." *Rogers,* 422 *U.S* at 48 (Marshall J. concurring).

Conclusion

The Federal Circuits are split on how to test if a true threat has been willfully made. The determination of the willfulness element should consider the maker's intention and should be dictated by the circumstances under which the statement was made. *Rogers* at 422 U.S. 48 (Marshall J. concurring). The Federal Circuits adoption of the objective test has made §871 a technical offense, the very problem

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[1] *United States v. Compton*, 428 F.2d 18 (2nd Cir., 1970) cert. denied, 401 U.S. 1014; *United States v. Howell*, 719 F.2d 1258, 1260 (5th Cir. 1984);United *States v. Lincoln*, 462 F.2d 1368 (6th Cir., 1972) cert. denied, 409 U.S. 952; *Roy v. United States*, 416 F.2d 874 (9th Cir., 1969); *United States v. Hart*, 457 F.2d 1087 (10 Cir., 1972) cert. denied, 409 U.S. 861.

Representative Webb sought to avoid. Cong. Rec (1916) at 9378; [App. A 5a].

The subjective test for the willfulness element of §871 is in accordance with the Congressional intent and would follow this Honorable Court's guidance that negligence standards in criminal statutes are generally disfavored. As long as this split exists this Court will continue to see "mischief in future prosecutions brought under §871." *U.S. v. Rogers*, U.S. at 48 (Marshall J. concurring). Accordingly the Petitioner respectfully requests the Court grant this petition for a writ of certiorari.

Respectfully submitted,

CHARLES C. HALE
Major, U.S. Marine Corps
Counsel of Record

Navy-Marine Corps Appellate
Defense Division
716 Sicard St. SE, ste. 1000
Washington Navy Yard, D.C. 20347
(202) 685-7290

July 2001

APPENDIX A
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
WASHINGTON, D.C. 20442-0001

UNITED STATES, Appellee

V.

Robert B. OGREN, Seaman Recruit

U.S. Navy, Appellant

No. 00-0169

Crim. App. No. 99-0041

United States Court of Appeals for the Armed Forces

Argued October 11, 2000

Decided May 2, 2001

BAKER, J., delivered the opinion of the Court, in which

CRAWFORD, C.J., and SULLIVAN, GIERKE, and

EFFRON, JJ., joined.

Counsel

For Appellant: Major Charles C. Hale, USMC (argued); Lieutenant Commander L. J. Lofton, JAGC, USN (on brief).

For Appellee: Lieutenant Deborah Sue Mayer, JAGC, USNR (argued); Colonel Kevin M. Sandkuhler, USMC, Commander Eugene E. Irvin, JAGC, USN, and Lieutenant Kevin S. Rosenberg, JAGC, USNR (on brief).

Military Judge: Peter. J. Straub

Judge BAKER delivered the opinion of the Court.

A general court-martial composed of a military judge sitting alone convicted appellant, pursuant to mixed pleas, of disrespectful language (3 specifications), disobeying a petty officer, damaging military property, assault and battery, and communication of a threat (2 specifications), in violation of Articles 91, 108, 128, and 134, Uniform Code of Military Justice, 10 USC §§ 891, 908, 928, and 934, respectively. One specification of communicating a threat involved a violation of 18 USC § 871, "Threats against President[.]" Appellant was sentenced to a dishonorable discharge, confinement for 12 months, and partial forfeitures. The convening authority approved these results, and the Court of Criminal Appeals affirmed. 52 MJ 528 (1999).

On appellant's petition, we granted review of the following issue:

Whether the lower court erred in finding appellant's conviction of threatening the President of the United States

legally and factually sufficient as there was no evidence of a "true threat."

Although this Court has addressed the question of threats, see, e.g., United States v. Phillips, 42 MJ 127 (1995), this is a case of first impression involving the interpretation of 18 USC § 871. After adopting the so-called objective test in our analysis of the willfulness of the threat and viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have reasonably found beyond a reasonable doubt that appellant knowingly and willfully uttered a true threat in violation of § 871. We affirm.

I. Facts

The events at issue occurred on July 21 and 22, 1998, 26 and 27 days after appellant was placed in pretrial confinement awaiting general court-martial on unrelated charges.

On two separate occasions on July 21, appellant made statements involving the President. Appellant first told Petty Officer Lyell: "**** off. And **** the rest of the staff. **** Admiral Green. Hell, **** the President, too. . . . [As] a matter of fact, if I could get out of here right now, I would get a gun and kill that bastard." Petty Officer Lyell understood that this latter reference was to the President of the United States. Appellant did not indicate that he had a plan or scheme to get a gun and kill the President. However, Petty officer Lyell took the statement seriously.[1]

Appellant's second statement was to Operations Specialist Second Class Marnati, recounted by Marnati at trial as follows:

OSI Marnati: [I asked appellant] why he was beating on his cell and what's he yelling for. . . . He told me, "I can't wait to get out of here, Man." I said, "Why?" He said, "Because I'm going to find the President, and I'm going to

shove a gun up his ***, and I'm going to blow his ******* brains out.". . .I asked him which President he was talking about. . . . He said, "Clinton, Man. I'm going to find Clinton and blow his ******* brains out" or similar to that.

Appellant's statements surprised Marnati.[2] He had never heard anyone threaten the President before.[3] Lyell and Marnati recorded appellant's statements in the log and telephoned the Secret Service. There is no indication in the record that either statement was made for political, religious, or moral reasons.

The Secret Service responds whenever it receives a report that someone has threatened the President. On July 22, Special Agent Cohen interviewed appellant. Asked to describe what he had said, appellant repeated his statements with words similar to those described above. Special Agent Cohen testified: "[H]e did admit to making a threat -- but he didn't say again that he would do it, no." Significantly, when appellant was asked whether he owned guns, he responded: "No, but I can get them." Appellant also asked Special Agent Cohen "if his other than honorable discharge would affect his ability to get weapons . . . for hunting." At the same time, appellant told the Secret Service that he was blowing off steam and was expressing displeasure at his incarceration. In response to a query by Special Agent Cohen, appellant drafted a sworn statement of apology to the President.

The record reflects that appellant was a "problem confinee" with a mixed record. At times, he was respectful and followed orders. However, he was always making comments to the staff and other confinees. He would holler at them from his cell. He would constantly indicate he did not want to be in the pretrial confinement facility. There were a couple of times appellant caused problems and was placed in segregation. However, after his Secret Service interview, appellant "pretty much quieted down and started

actually becoming a little bit more cooperative and adherent to rules and regulations." Appellant did not subsequently threaten the President.

II. Discussion

Section 871(a) of Title 18[4] was enacted in 1917 against a backdrop of three presidential assassinations.[5] The statute is intended to prevent and deter individuals from attacking the President or inciting others to do so.[6] The statute is also intended to prevent disruptions in the ability of the President to undertake his responsibilities caused by confining his activities and movement, including those activities of a public nature. Rogers v. United States, 422 U.S. 35, 47 (1975)(Marshall, J., concurring); Roy v. United States, 416 F.2d 874, 877 (9th Cir. 1969); United States v. Hoffman, 806 F.2d 703, 706 (7th Cir. 1986); see also H.R. Rep. No. 652, 64th Cong., 1st Sess. (May 8, 1916) ("It is the first and highest duty of a Government to protect its governmental agencies, in the performance of their public services, from threats of violence which would tend to coerce them or restrain them in the performance of their duties."). Finally, the legislative history indicates that Congress considered threats against the President to be of such significance as to warrant a statutory prohibition different from the statutes applicable to other officials.[7]

However, Congress was also mindful of the statute's potential to reach protected First Amendment speech and intended to establish more than a technical offense. As the Floor Manager for the bill stated:

I think it must be a willful intent to do serious injury to the President. If you make it a mere technical offense, you do not give him much of a chance when he comes to answer before a court and jury. I do not think we ought to be too anxious to convict a man who does a thing thoughtlessly.

53 Cong. Rec. 9378.

With this legislative history in mind, courts have required the Government to prove two elements beyond a reasonable doubt to convict pursuant to § 871(a). First, the threat rendered must be a "true" threat. Second, the threat must be knowing and willful.

A. True Threat

Section 871(a) must be read consistent with the dictates of the First Amendment.[8] Justice Douglas has observed that criticism of the President and Congress is an American birthright: "Suppression of speech as an effective police measure is an old, old device, outlawed by our Constitution." Watts v. United States, 394 U.S. 705, 712 (1969) (concurring). Therefore, only "true" threats have been found to satisfy the statute's threshold of criminal conduct; a true threat is not protected First Amendment speech.[9] United States v. Howell, 719 F.2d 1258, 1260 (5th Cir. 1984); United States v. Carrier, 672 F.2d 300, 303, 306 (2d Cir. 1982). In addition to political hyperbole, "true" threats also may not include jests or innocuous remarks. Watts, 394 U.S. at 707-08.

In Watts, the Supreme Court found § 871(a) constitutional on its face, but reversed Watts's conviction because: (1) the "context"; (2) "the expressly conditional nature of the statement"; and (3) "the reaction of the listeners" indicated Watts's words did not amount to a true threat but, rather, a "kind of very crude offensive method of stating a political opposition to the President." Id. Applying this three-part language, courts have struggled with the concept of what constitutes a "true threat."

In Howell, a patient in a state hospital made threatening remarks against the President. The FBI was notified by the hospital, and an agent visited Howell. Howell proceeded to tell the agent "that he had a .357 caliber pistol and that there were two people he wanted to kill—one of

them was the President." Howell was advised of his constitutional rights and stated: "If released, I would make my way to Washington and kill him—I will kill the President." The FBI agent asked Howell to write down his statements, and Howell said he wanted a lawyer. The next day, Howell handed a hospital social worker an envelope for the FBI agent containing a letter detailing his threats against the President. 719 F.2d at 1260. The Howell court found Howell's threats to be "true" threats, and that, "[f]ar from attempting to influence others, Howell was merely stating his own unambiguous and apparently quite serious intention to take the life of the President." Id. at 1260-61.

In United States v. Miller, 115 F.3d 361 (6th Cir. 1997), a prisoner claimed that "a rational person" would not believe that a letter he wrote to the President "published a 'true threat' to kill or injure the President or the Vice President because he was incarcerated in a penal institution at the pertinent time and because the letter's content evinced a delusional originator." Id. at 363.

In deciding that the lower court properly submitted the "true threat" issue to the jury, the Miller court found:

> The writing menacingly suggested its author's motives for inflicting injury upon the President and the Vice President, pointedly asserted that his claimed associates outside the prison would carry out the threatened assassinations, and confidently proclaimed his perceived immunity from prosecution by virtue of his incarceration alibi. The manifest instability and irrationality of the perpetrator of these menaces did not objectively diminish the letter's credibility but instead predictably heightened apprehension by its recipients that the author could be sufficiently imbalanced to seek the realization of his proclamations.

Id. at 364.

In United States v. Frederickson, 601 F.2d 1358 (8th Cir. 1979), the court distinguished between statements that formed the basis of three counts alleging threats against the President.[10] The Frederickson court found that the statement, "I will have to kill him," referring to the President, was properly submitted to the jury for a determination whether it was a true threat because it was made seriously and without provocation. On the other hand, statements that he would blow up "pigs" starting with the President and going down, made while upset about his arrest, were distinguished from the same statements made when he was "outwardly calm" and he

> volunteered a scheme of assassination utilizing a specific weapon and commencing with a particular individual, the President, who could be found in the place that was Frederickson's announced destination, Washington, D.C.

Id. at 1364. The former were found not to have been properly submitted to the jury to decide the "true threat" issue. The latter were found to have been properly submitted.

B. Willful

The statute also requires that a threat be knowing and willful. A threat is knowingly made if the speaker comprehends the meaning of the words uttered by him. Ragansky v. United States, 253 F. 643, 645 (7th Cir. 1918). However, federal circuits are divided as to whether the test for willful conduct is objective or subjective, that is, whether the statement must reflect an apparent intent to threaten or an actual intent.

1. The Objective Test

A majority of circuits apply an objective test: United States v. Fulmer, 108 F.3d 1486 (1st Cir. 1997); United States v. Johnson, 14 F.3d 766 (2d Cir. 1994); Rogers v. United States, 422 U.S. 35; United States v. Miller, 115 F.3d

361; United States v. Hoffman, 806 F.2d 703; Roy v. United States, 416 F.2d 874; Watts v. United States, 394 U.S. 705. The objective test requires "only that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President."[11] Roy, supra at 877; see also Rogers, supra at 43-44 (Marshall, J., concurring) ("a showing merely that a reasonable man...would have foreseen that the statements he made would be understood as indicating a serious intention to commit the act"). In other words, the willfulness of the statement is measured by the reasonably foreseeable consequences of the words uttered. Courts have upheld convictions where the declarant pleaded impossibility (United States v. Howell, 719 F.2d 1258) or diminished capacity (United States v. Johnson, supra), or could not have acted upon the threat due to incarceration (Miller).

This court has not had occasion to evaluate the application of 18 USC § 871 as assimilated through Article 134. In addressing the application of Article 134, this Court has applied an objective test for willfulness ("The intent which establishes the offense is that expressed in the language of the declaration, not the intent locked in the mind of the declarant." United States v. Greig, 44 MJ 356, 357 (1996) (citing United States v. Humphrys, 7 USCMA 306, 307, 22 CMR 96 (1956)). The offense is complete "when an 'avowed determination to injure another is announced'" (Humphrys, supra, citing United States v. Holiday, 4 USCMA 454, 458, 16 CMR 28 (1954)), provided that the language communicated and all the surrounding

circumstances would lead a reasonable person in the recipient's place to perceive a threat. Phillips, 42 MJ at 129.

2. The Subjective Test

At least one circuit has adopted a subjective test, holding that a "threat can form a basis for conviction under the terms of Section 871(a) only if made with a present intention to do injury to the President....There is no danger to the President's safety from one who utters a threat and has no intent to actually do what he threatens."[12] United States v. Patillo, 431 F.2d 293, 297-98 (4th Cir. 1970). In Frederickson, the Eighth Circuit applied the subjective test as "the law of this case," without necessarily adopting that standard as the law of the circuit. 601 F.2d at 1363.

3. The Supreme Court

In Watts, the Supreme Court did not reach this element of the offense and resolve the split between circuits, finding instead that the threat uttered by Watts[13] was not a true threat. However, the Court expressed "grave doubts about" an objective test of willfulness based on "an apparent determination to carry...[a threat] into execution." 394 U.S. at 707-08.

In Rogers, the Court again declined to resolve the split between circuits as to the proper test for willfulness, ruling on grounds unrelated to the interpretation of the statute. However, Justice Marshall argued that at a minimum, the willful arm of § 871(a) should require "that the defendant appreciated the threatening nature of his statement and intended at least to convey the impression that the threat was a serious one." 422 U.S. at 46 (concurring). Consistent with the Rogers perspective, a majority of courts have concluded that whether measured by subjective or objective intent, the defendant need not have intended to carry out the threat, but only to have made a threat.[14] See, e.g., United States v. Hoffman, 806 F.2d 703.

III. Conclusion

Like other federal courts, we apply the Watts language for determining a true threat. We also agree with the majority of federal circuits and adopt the objective standard for determining whether the communication was willful. We do so based on the plain language of the statute, its legislative history, and our review of federal case law, which is particularly relevant to this court in interpreting Title 18. The objective test more closely tracks Congress's intent in passing § 871 than the subjective test. Although the protection of the President's life is the paramount concern of the statute, the statute is also intended to protect against the harm associated with the threat itself. 422 U.S. at 47. This harm may occur at the moment a threat issues, e.g., with a change in schedule or the dispatch of investigators. Thus, even if the recipient's response to a threat is subsequently found to be unreasonable, one of the harms Congress sought to avoid will have already occurred.[15]

In contrast, the subjective test, which seeks to find the declarant's actual intent, imposes too high a threshold to accomplish the purposes for which § 871 was enacted. While application of a subjective test might deter actual assaults on the President, it might not deter a subjectively neutral declarant from inciting others to action, or from disrupting the President's activities where the Secret Service does not have the luxury of knowing actual intent. For these reasons, § 871(a) does not require that the trier of fact, or the Secret Service, look into the mind of the declarant to determine actual intent.

In adopting the objective standard, we are cognizant of the Supreme Court's "grave concern" with an "apparent" rather than actual intent test, as well as the Court's corresponding admonition that "we must interpret the language Congress chose against the background of a

profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open[.]" 394 U.S. at 708. Congress did not intend to create a technical offense. For these reasons, application of 18 USC § 871(a) necessarily encompasses a careful application of law to facts. This is particularly so given the importance of distinguishing between a true threat and protected speech. There is little margin for legal error where the First Amendment and the safety of the President are at stake; what comes out of mouths may have grave consequences for both.

In the case at bar, our duty is to determine whether "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). Applying that standard to this case, we conclude that a rational trier of fact could have found that appellant threatened the life of the President, in violation of 18 USC § 871(a).

First, appellant's threats were "true" threats. They were not conditional on the occurrence of an event, such as induction in the armed forces.[16] Moreover, the specific context and the reaction of the listeners in that context set these words apart. This is evidenced by the testimony of Petty Officers Lyell and Marnati. In a context where appellant frequently hollered from his cell, they took these threats seriously. They distinguished these words from appellant's other words. They logged them in and then they called the Secret Service.

This specific context and the reaction of the listeners are also directly relevant to the second necessary conclusion -- appellant's threats were knowing and willful. Appellant should have reasonably foreseen that his threats would be understood to be more than a crude method of responding to confinement. Pivotal here are appellant's responses to

Special Agent Cohen. If we accept arguendo that there is doubt whether appellant should have reasonably foreseen that his statements to Petty Officers Lyell and Marnati were threats on July 21 (given his track record of verbal insult), this doubt does not carry over to July 22. On July 22, with the benefit of a night to reflect and aware that his words had resulted in a Secret Service interview, appellant did not disavow his threat made the previous day. When asked, he repeated what he had told Petty Officers Lyell and Marnati. But appellant went further. Critically, he told Special Agent Cohen that he could get weapons if he wanted, and he asked whether his other than honorable discharge would preclude him from getting weapons. In this sense, the case parallels Howell, where the defendant was given a night to reflect and still provided his threatening remarks in writing the next morning.

The law makes clear that neither Petty Officers Lyell and Marnati, nor Special Agent Cohen, were required, nor could they be expected, to divine appellant's actual and subjective interest in procuring weapons when released from confinement. Appellant had said enough to trigger the policy interests and prohibitions of § 871(a).

Appellant's threats may have been made in anger and frustration at being incarcerated, but that does not excuse their threatening content. In some cases, it may make the threat more credible, as noted by the Miller court. Nor were appellant's words uttered in a political context, intertwined with the substance of political protest or criticism, or an effort at sharing ideas.[17]

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

FOOTNOTES:

[1] At trial, Lyell stated: "[T]hat's a little bit more serious of anything else that he had done. . . . I took him serious enough, yes."

[2] Marnati testified he was surprised "[n]ot so much [by] the way he said it; it's just the fact he actually said it and what he was going to do."

[3] The record is ambiguous as to whether appellant told one staff member that he wanted to use a knife to kill the President and another staff member that he wanted to use a gun to kill the President.

[4]Section 871(a) provides:

Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office of by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of The United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowing and willfully otherwise makes any such threat against the President, President-elect, Vice President, or Vice President-elect, shall be fined under this title or imprisoned not more than five years, or both.

As originally enacted, the statute applied only to the President of the United States.

[5] President Lincoln (1865), President Garfield (1881), and President McKinley (1901). Those purposes remain as valid and needful today as they were in 1917. Since 1917, there has been one presidential assassination and at least six attempts to kill the President or President-elect.

[6] See 53 Cong. Rec. 9377-9378 (1916).

[7] The statement of Representative Mann illustrates these points: "Assaulting the President of the United States is quite a different matter from assaulting some private

individual. . . .[I]n this bill you are differentiating the office of President, and the man who fills the office, from any other citizen of the United States, as ought to be done." Representative Webb went further, suggesting that one purpose of the bill was to protect the President from the "annoyance" of threatening mail and not only to protect his life. 53 Cong. Rec. 9377.

[8] The First Amendment provides that "Congress shall make no law... abridging the freedom of speech[.]"

[9] Justice Holmes's analogy to shouting "Fire!" in a crowded theater is, perhaps, the most famous expression of the limitations of the First Amendment; however, its illustrative instruction only goes so far, as it is an example free of political content. See generally H. Kalven, A Worthy Tradition (1988), for discussion of the Court's First Amendment jurisprudence and what Kalven describes as "the basic problem of finding an accommodation between speech too close to action and censorship too close to criticism." Id. at 156.

[10] Frederickson was arrested for trespass in Iowa. While in custody, he told the police that he was from California and was on his way to Washington to sue the President. He then made these three additional statements to the police for which he was prosecuted: "Sue him? I probably wouldn't get any money anyway. I will have to kill him." (Count I); "Well, as soon as my toys get here I will eliminate all the pigs from the President on down." (Count II); "You know, I have an M-79 [grenade launcher]. I am going to blow them all up. I start with the President and go down." (Count III). 601 F.2d at 1361-62. The court reversed on Count II and affirmed Frederickson's convictions on Counts I and III.

[11] In Roy, the Ninth Circuit appears to have considered both perspectives. 416 F.2d at 877-78.

[12] The court went on to note an exception to its analysis where "inflammatory statements are made in a 'full context' evidencing on the part of the speaker a reckless disregard for the strong likelihood that his listeners would be incited to do harm to the President." 431 F.2d at 298.

[13] During a public rally on the Washington Monument grounds, Watts engaged in a discussion with a number of the participants. In response to a statement that he get more education before expressing a view on the Vietnam War and the draft, Watts responded: "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." 394 U.S. at 706.

[14] See the comments of Rep. Webb and Volstead. 53 Cong. Rec. 9377-79.

[15] Because 18 USC § 871 can be violated by persons not subject to the UCMJ, our ultimate conclusion as to the sufficiency of the evidence in this case is not based on the President's special status as Commander in Chief or appellant's status as a member of the armed forces. Our decision to adopt an objective standard for willfulness, however, is consistent with the maintenance of good order and discipline in the armed forces and serves to promote the proper relationship between the military force and its Commander in Chief. Nor do we rely on United States v. Stickrath, 242 F. 151 (S.D. Ohio 1917), cited by the lower court, which offers the Government too pliant a description of the objective test.

[16] In Watts, the Court found that Watts's threat was conditioned on his induction into the armed forces: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." 394 U.S. at 706. As discussed above, courts

have not found release from incarceration or a mental health facility to be conditional from the perspective of Watts. See, e.g., United States v. Howell, 719 F.2d 1258 (defendant in state hospital at time of threat); United States v. Miller, 115 F.3d 361 (defendant in state penitentiary). Similarly, appellant's limited period of confinement did not make his threat conditional under Watts.

[17]To paraphrase Judge Learned Hand in United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), having not brought himself within the zone of protected speech, we need not decide how far outside that zone appellant has landed.

APPENDIX B

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.

BEFORE

CHARLES Wm. DORMAN R.H. TROIDL
JOHN W. ROLPH

UNITED STATES

v.

Robert B. OGREN
Seaman Recruit (E-1), U.S. NAVY

NMCM 99 00041 Decided 29 October 1999

Sentence adjudged 16 November 1998. Military Judge: P.J. Straub. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Training Center, Great Lakes, IL.

LCDR LINDA J. LOFTON, JAGC, USN, Appellate Defense Counsel
LCDR PATRICIA M. SULZBACH, JAGC, USNR, Appell ate Defense Counsel
LCDR PAUL D. LOCHNER, JAGC, USNR, Appellate Government Counsel

LT KEVIN S. ROSENBERG, JAGC, USN, Appellate Government Counsel

ROLPH, Judge:

In this mixed plea case before a military judge, sitting alone as a general court-martial, the appellant was convicted, in accordance with his pleas, of two specifications of using disrespectful language to senior petty officers, one specification of disobeying the lawful order of a chief petty officer, one specification of willfully damaging military property, and one specification of assault consummated by a battery, in violation of Articles 91, 108, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 908, and 928 (1994). Contrary to his pleas, the appellant was also convicted of a third specification of disrespect to a petty officer, one specification of communicating a threat, and one specification of communicating a threat to harm the President of the United States[3] in violation of Articles 91 and 134, UCMJ, 10 U.S.C. §§ 891 and 934. The appellant was sentenced to confinement for 12 months, reduction to E-1, total forfeiture of pay and allowances, and a dishonorable discharge. The convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed. Pursuant to the terms of the appellant's pretrial agreement, the convening authority suspended all confinement in excess of 200 days for a period of 12 months from the date of trial.

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[3] In violation of 18 U.S.C. § 871(a)(1994), as assimilated under Article 134, UCMJ.

We have carefully examined the record of trial, the appellant's four assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to appellant's substantial rights was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

As a result of his multiple incidents of disruptive misconduct, including assault and battery upon a fellow Sailor, the appellant was placed in pretrial confinement on 25 June 1998, at the Pretrial Confinement Facility located at the Naval Training Center (NTC), Great Lakes, IL. Record at 77, 84; Charge Sheet. The Government established, and the defense readily conceded, that the appellant was an abusive, antagonistic, and disruptive pretrial confinee. On the evening of 20 July 1998, upon being subjected to a random cell search, the appellant became especially abusive and threatening towards EM2 Simona Williams, USN, a brig guard. He stated to her, "I'm going to eat your children." "I'm going to eat you, and I'm going to f--- you up." He went on to state that "the Navy locator [service] is a wonderful thing," that he would find her and her children, and that "while you're at work, I'm going to find your children and f--- them up." Record at 53-54, 60; Charge sheet. Ultimately, the appellant calmed down and went to sleep.

The following morning, on 21 July 1998, the appellant became enraged again when EM2 Williams asked him to sign a "hard card"[4] acknowledging his inappropriate

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[4] Apparently, a "hard card" is a counseling form utilized to

behavior towards staff personnel the night before. He repeated many of the same threats to EM2 Williams that he had stated the night before, threw his breakfast all over his cell door and window, flooded his cell with water by stopping up the drain to his sink, and resisted violently when guards tried to subdue him. Ultimately, he was placed in a four-point restraining harness. Later that day, MM3(SS) Jason Lyell, USN, another brig guard, confronted the appellant about abusive comments he had made to another pretrial detainee. The appellant told MM3(SS) Lyell to "F--- off!" Record at 76. He also stated, "F--- you, f--- Chief, f--- the Admiral, and f--- the President." Record at 76, 82. He then said, "As a matter of fact, If I could get out of here right now, I would get a gun and kill that bastard!" Record at 76. MM3(SS) Lyell took the appellant's comments seriously and reported them to his leading chief petty officer, MAC Robert Sulia, USN. Record at 77.

OS2 Joseph M. Marnati, USN, also a brig guard, similarly approached the appellant that morning and asked him why he was enraged and beating on the bulkheads of his cell. The appellant responded, "I can't wait to get out of here man." OS2 Marnati inquired why, and the appellant stated, "Because I'm going to find the President, and I'm going to shove a gun up his ass, and I'm going to blow his f---ing brains out." Record at 85. OS2 Marnati asked him what President he was talking about, and the appellant responded, "Clinton, Clinton man! I'm going to find Clinton and blow his f---ing brains out." *Id.* OS2 Marnati documented the incident in the brig's log-book and notified

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document poor performance or misconduct.

his section leader.

Finally, MAC Robert Sulia, USN, the chief petty officer in charge of the Pretrial Confinement Facility, spoke to the appellant after he was briefed by his staff in regard to the appellant's aberrant behavior and multiple threats towards the President. The appellant acknowledged his misconduct and claimed that it was due to the brig staff being "overbearing." Record at 68-70.

The appellant's threats against the President were ultimately reported to the U.S. Secret Service Agency. On 23 July 1998, Special Agent Douglas Cohen of the Secret Service interviewed the appellant in the brig. The appellant admitted to agent Cohen that he had made a threatening statement ("something to the effect of he would get a gun and get some bullets, shove it up the President's ass, and blow his head off . . . or brains out."). Record at 94. When asked by Agent Cohen whether he owned any guns, the appellant replied, "no, but I can get them." *Id.* The appellant was temporarily removed to the Metropolitan Correctional Center in Chicago, IL, while his threat was investigated by the Secret Service, and he ultimately apologized for making the threat, authoring the following letter to the Clinton family:

I, Seaman Recruit Robert Ogren, on July 23rd, 1998, write this letter of apology to comments [sic] that I spoke about the President on 21 [sic] in reference to harming Mr. Clinton. I would not entertain the thought of hurting him. I hope he live [sic] a happy live [sic] with his family. May God bless the Clintons.

Defense Exhibit A; Record at 98.

Legal and Factual Sufficiency of the Evidence Supporting Conviction for Threatening the President of the United States

In his first assignment of error, the appellant challenges both the legal and factual sufficiency of the evidence supporting his conviction under 18 U.S.C. § 871(a)(1994), as assimilated under Article 134, UCMJ, for verbally threatening the President of the United States of America. He specifically challenges his conviction on the basis that there was no evidence to establish that he made a "true threat" against President Clinton.

Although the Federal Circuit Courts have addressed 18 U.S.C. § 871 (1994) extensively, this case represents the first opportunity any military appellate court has had to interpret this federal statute, and to address the question raised by the appellant as to what constitutes a "true threat" under its provisions.

While one of the strengths of democracy lies in its willingness to tolerate and even encourage dissent, this tolerance is not without boundaries. The purpose and necessity of the "Threats Against the President" statute has regrettably become all too clear over the course of this century. Title 18 U.S.C. § 871(a)(1994), the "Threats Against the President and Successors to the Presendency" statute, specifically reads as follows:

Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or any letter carrier, any letter, paper, writing, print, missive, or document containing any threat to take the life of, to

kidnap, or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, ***or knowingly and willfully otherwise makes any such threat against the President***, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President- elect, shall be fined under this title or imprisoned not more than five years, or both.

Emphasis added.

Originally enacted in 1917,[5] 18 U.S.C. § 871 recognizes in its terminology "that it is the making of the threat that is prohibited without regard to the maker's subjective intention to carry out the threat." *United States v. Manning*, 923 F.2d 83, 86 (8th Cir. 1991). "The threat alone is disruptive of the recipient's sense of personal safety and well-being and is the true gravamen of the offense." *Manning*, 923 F.2d at 86. As was so well stated in *United States v. Stickrath*, 242 F. 151, 153 (D.C. Ohio 1917), "[t]o threaten to kill [the President] or to inflict upon him bodily harm stimulates opposition to national policies, however wise, even in most critical times, incites the hostile and evil-minded to take the President's life, adds to the expense of his safeguarding, is an affront to all loyal and right-thinking persons, inflames their minds, provokes resentment, disorder, and violence, is akin to treason, and is rightly denounced as a crime against the people as the sovereign power." The statute serves to protect the

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[5] As 18 U.S.C. § 89.

President and to "preserve the tranquillity of the people and their peace of mind." *Stickrath*, 242 F. at 153.

This offense has two essential elements:

That the accused's words or actions constitute a true threat; and

That the accused used those words, or took those actions, knowingly and willfully.

See United States v. Johnson, 14 F.3d 766, 769 (2nd Cir. 1994); *United States v. Rogers*, 488 F.2d 512, 514 n.2, 3 (5th Cir. 1974), *reversed on other grounds,* 422 U.S. 35 (1975).

A. A "True Threat."

The appellant asserts that the evidence is both legally and factually insufficient to establish that his statements concerning President Clinton constituted a "true threat" as required by this statute. He relies on the argument that he made his threatening statements 1) in a fit of anger, while being "antagonistic" and "venting," 2) while in confinement, and 3) never intending to actually inflict any harm upon the President. All of these factors, he claims, militate against the statement concerning President Clinton being interpreted as a "true threat." We disagree.

The test for assessing legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *United*

States v. Turner, 25 M.J. 324 (C.M.A. 1987). When applying this test, we are bound to draw every reasonable inference from the record in favor of the prosecution. *United States v. McGinty*, 38 M.J. 131 (C.M.A. 1993). The test for assessing factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses . . . [we are] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. *See* Art. 66(c), UCMJ.

Under our Article 66(c), UCMJ, mandate, we may only affirm court-martial findings that are correct in law and fact, and that we determine, on the basis of the entire record, should be approved. In executing this mandate, we are given broad power to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." Art 66(c), UCMJ.

A "true threat" for purposes of this offense means *any* contextually credible threat to kill, injure, or kidnap the President (or one of his successors listed in 18 U.S.C. § 871). *Watts v. United States*, 394 U.S. 705 (1969)(*per curiam*).[6] If the accused "should have reasonably foreseen

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[6] *See also United States v. Merrill*, 746 F.2d 458 (9th Cir. 1984) (mailing letters depicting Ronald Reagan's head impaled on a pike and dripping blood, and containing the words "kill Reagan" was true threat to harm the President); *Roy v. United States*, 416 F.2d 874 (9th Cir. 1969)(holding that a Marine assigned to a base the President planned to visit on following day properly convicted for communicating a "true threat" when he told telephone

that the statement he uttered would be taken as a threat by those to whom it [was] made," he may be properly convicted under this statute. *United States v. Fulmer,* 108 F.3d 1486, 1491 (1st Cir. 1997).[7] "True threats" are not protected by the First Amendment's free speech guarantees. *Watts*, 394 U.S. at 707; *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Conversely, communications which

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operator, "I hear the President is coming to the base. I am going to get him."); *Pierce v. United States*, 365 F.2d 292 (10th Cir. 1966)(ruling that the 17-year-old boy's written statement that he would kill the President of the United States "the first chance I get," given to police officer to be mailed to the White House for him because he was in jail for desertion from the Navy, was held to be "true threat."); *Clark v. United States*, 250 F. 449 (5th Cir. 1918) (concluding that statement, "I wish Wilson was in Hell, and if I had the power I would put him there," was threat against the President).

[7] In adopting this view, we expressly reject the so-called "reasonable recipient standard" which focuses on the unique sensitivities of the recipient(s) of the threatening statement(s). That standard seeks to determine whether "an ordinary, reasonable recipient who is familiar with the context of the [statement] would interpret it as a threat of injury." *United States v. Maisonet*, 484 F.2d 1356, 1358 (4th Cir. 1973). While both tests are objective in nature, we believe the appropriate vantage point for interpreting these statements is what the person making the statement should have reasonably foreseen, rather than what a reasonable person receiving the statement would believe. *See Fulmer*, 108 F.3d at 1490, 91.

"convey mere political hyperbole, innocuous talk, jest, or similar speech" are beyond the statute's reach and insulated by the First Amendment. *Watts*, 394 U.S. at 707-08; *United States v. Miller*, 115 F.3d 361, 363 (6th Cir., 1997), *cert. denied*, 522 U.S. 883 (1997).[8] In determining whether or not a "true threat" was made, the fact-finder must necessarily consider the context and circumstances in which the statement was made, whether the statement was conditional in nature, who the statement was directed to, the place where it was made, how it was made, and the reaction of those who heard or read it. *See United States v. Carrier*, 672 F.2d 300, 306 (2d Cir. 1982); *Watts*, 394 U.S. at 708.

The appellant's reliance on *United States v. Frederickson*, 601 F.2d 1358 (8th Cir. 1979), as a basis for asserting that his threat did not violate 18 U.S.C. § 871(a) is misplaced. The facts in *Frederickson* are clearly distinguishable from the appellant's case. In *Frederickson*, the Eighth Circuit reversed the appellant's conviction for threatening the President based upon his statement, made in a fit of anger, that he was going to "eliminate all the pigs from the President on down." *Frederickson*, 601 F.2d at 1361. The court believed three factors were particularly important in their ruling. First, Frederickson contemporaneously made several other remarks at the time he uttered this alleged threat, many "containing threats of a

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[8] In *Watts*, an 18-year-old boy's statement within a political discussion group congregated on the Washington mall that, "If they make me carry a rifle, the first man I want to get in my sights is L.B.J," was held to be mere political hyperbole, and not a "true threat."

bizarre nature, and others representing unconventional or rebellious responses to police questioning that could not reasonably be taken seriously [under] the circumstances." *Id.* at 1364. Second, "the sweeping nature of his statement, referring to 'all pigs from the President on down,' undermine[d] any inference that [he] intended his words as a threat against the President ***personally***." *Id.* (emphasis added). The court reasoned that Frederickson's statement was "no more than a crude method of expressing antagonism towards the arresting officers and law enforcement officers generally." *Id.*[9] Finally, the booking officer who heard the threat simply asked Frederickson to "turn around and finish being booked," reflecting his lack of concern over the threat.

The appellant correctly describes himself as a problem confinee who was antagonistic toward the staff and noncompliant with brig rules. Appellant's Brief of 16 June 1999 at 5. He argues that his constant antagonistic behavior was a means of venting his displeasure at being confined, and, therefore, he did not intend to threaten the President.[10] *Id.* The appellant was not, however, in a

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[9] Frederickson *was* convicted of another count alleging violation of 18 U.S.C. § 871(a) which indicated "more specificity" concerning Frederickson's threats towards the President.

[10] The appellant does not explain the leap of logic required to connect obnoxious, belligerent behavior to a lack of intent to threaten the President. Appellant's assertion that "[T]he facts of his case closely parallel those of *Frederickson"* is grasping, and ignores that court's affirmation of one of the counts of threatening the President

constant state of belligerent agitation. When confronted by MAC Sulia about threats he had made to one of the Pretrial Confinement Facility staff, the appellant was very conversational and low key with the Chief. Record at 60, 68. At times, appellant was very respectful and followed orders with no problem. Record at 61. Although MAC Sulia noted appellant's "total disregard toward anybody [who was] an authority figure," in his dealings with appellant, most often appellant would "stand up and give me straight 'Yes, sir,' 'No, sir,' 'Yes, Chief,' 'No, Chief' answers." Record at 69. Perhaps most telling was the colloquy between trial defense counsel and OS2 Marnati. When asked, "Would it be fair to say that Seaman Recruit Ogren was always trying to piss people off, especially staff members?" OS2 Marnati replied in the negative. When asked whether the appellant did this on a regular basis, OS2 Marnati responded, "It seemed like whenever he had nothing better to do, if he was bored." Record at 87.

The appellant's attempt to paint himself as the seething equivalent of Frederickson merely displaying his anger to the Pretrial Confinement Facility staff is unpersuasive. Applying the factors used by the Frederickson court, we find that the appellant's language was unequivocal and directed specifically at President Clinton, and that the Government produced evidence that he spoke the words seriously, deliberately, and neither in jest nor in response to a particular provocation. Record at 76-77, 84-85. Further, unlike Frederickson, who was in the midst of the booking process, appellant had been in pretrial confinement for

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made while Frederickson was confined in the county jail. *Frederickson*, 601 F.2d at 1362, 1364.

nearly one-month when he made the threats against the President. Record at 76, 84; Charge Sheet. The statements made to MM3 Lyell and OS2 Marnati were obviously not spoken in the heat of anger as an expression of animosity towards law enforcement, as they were separated by approximately three hours. *Id.* Appellant did not make any contemporaneous bizarre remarks. Record at 76-77, 84-85. Again, the actions taken by MM3 Lyell and OS2 Marnati in logging and reporting appellant's remarks and the summoning of the Secret Service demonstrate a serious concern over the remarks. Record at 77, 85-86, 93. Moreover, appellant's language singled out the President as the initial object of his violent plan. *Id.* We are satisfied that the appellant should have reasonably forseen that his statements would be taken as threats by those to whom they were made and thus were "true threats" within the meaning of this 18 U.S.C. § 871.

B. "Knowingly and Willfully" Made.

The second element of this offense requires that the appellant's "true threat" be made knowingly and willfully. It is well settled among the vast majority of the federal circuit courts of appeal that this element of 18 U.S.C. § 871 establishes an objective test requiring only a showing of general intent.

[T]he willfulness requirement of [§ 871] . . requires only that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President,

and that the statement not be the result of mistake, duress, or coercion. ***The statute does not require that the defendant actually intend to carry out the threat.***

United States v. Johnson, 14 F.3d at 768 (*quoting Roy v. United States*, 416 F.2d 874, 877-78 (9th Cir. 1969))(emphasis added)); *see also United States v. Twine*, 853 F.2d 676, 680 (9th Cir. 1988); *United States v. Compton*, 428 F.2d 18 (2d Cir. 1970); *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991); *United States v. Manning*, 923 F.2d 83, 85-86 (8th Cir. 1991); *United States v. Vincent*, 681 F.2d 462, 464 (6th Cir. 1982); *United States v. Hart*, 457 F.2d 1087, 1090-91 (10th Cir. 1972).

Thus, the only requirement is that the accused intentionally and knowingly communicated his threat. ***It makes no difference whether or not he actually intended or was able to carry out his threat.***[11] *United States v. Orozco-Santillan,* 903 F.2d 1262, 1265 n.3 (9th Cir. 1990). If the speaker intended to make the statement, knew what the words meant, and reasonably should have foreseen that

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[11] Only the Fourth Circuit has adopted the subjective standard, which construes the term "willfully" to require proof that an accused made the alleged threat with specific intent to execute it. *United States v. Patillo*, 431 F.2d 293 (4th Cir. 1970)(*en banc)*(requiring a present intention to injure the President, or to incite others to injure him, or to restrict his movements). We specifically reject the subjective standard, and adopt the majority view on this issue, a view we believe to be consistent with the intent of the statute.

the statements he made would be understood as indicating a serious intention to commit the act, then this element is satisfied. *Ragansky v. United States*, 253 F. 643, 645 (7th Cir. 1918); *but see Watts,* 394 U.S. at 709 (Douglas, J. concurring)(expressing "grave doubts" as to the correctness of this approach *vis-à-vis* the potential First Amendment implications).[12]

In this case, we are convinced beyond a reasonable doubt that the appellant's threat to kill President Clinton was "knowingly and willfully" made. First, he knowingly uttered the statement clearly understanding what his words meant. Certainly, he foresaw that his statement, "I'm going to find the President, and I'm going to shove a gun up his ass, and I'm going to blow his f---ing brains out," would be understood by the brig guards who heard it as indicating a serious intention on his part to commit the act (whether he actually meant it or not). Indeed, the two guards who heard and confirmed the threat believed the appellant was serious. One actually recorded the threat in the brig's log-book to document it, and then reported it to the brig's chief petty

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[12] Although the Supreme Court in *Watts* once expressed "grave doubts" about the "apparent-determination" standard, and Justice Marshall urged the adoption of a more exacting standard in *Rogers v. United States*, 422 U.S. 35 (1975) (Marshall, J. concurring) (interpreting 10 U.S.C. § 871(a) to require a showing that "the speaker intended his statement to be taken as a threat, even if he had no intention of actually carrying it out."), the clear trend towards the majority view has persisted. *See Manning*, 923 F.2d at 85 (citing *United States v. Neavill*, 868 F.2d 1000, 1005 (4th Cir. 1989)).

officer in charge. The seriousness with which this threat was viewed is perhaps best demonstrated by the fact that the U.S. Secret Service Agency was contacted, and a follow-up investigation by that agency was conducted. The fact that the appellant may not have actually meant what he said, or that he eventually apologized, does not serve as a defense to his communication of the threat.

We are unmoved by the argument that the appellant was in confinement and, therefore, ostensibly incapable of carrying out any such threat. The appellant's "imprisonment does not automatically transmute a . . . threatening [statement] into an innocuous prank." *United States v. Miller*, 115 F.3d at 363 (*citing United States v. Glover*, 846 F.2d 339, 344 (6th Cir. 1988)). While it is a factor we take into consideration, it is in no way dispositive of the issue.

Manifestly, an incarcerated individual who may be associated with a radical political organization, a lunatic fringe element, or any other criminally inclined gang or other affiliation may pose a significant risk of igniting or inspiring criminal activity outside the institution.

. . . .

A reasonable person would foresee that the [statement] in controversy would be construed, and investigated, by the authorities as a potentially serious threat against the [life of the President].

Miller, 115 F.3d at 363-364; *United States v. Glover*, 846 F.2d 339 (6th Cir. 1988)(inmate's threats to President made from prison were nevertheless true threats despite inability

to carry them out, since reasonable person could objectively perceive them to be true threats); *United States v. Lincoln,* 589 F.2d 379, 381 (8th Cir. 1979)(per curiam).

We are similarly unmoved by the fact that the appellant suffered from a diagnosed "Antisocial Personality Disorder" at the time that he uttered his threatening words against the President. Such a diagnosis falls short of establishing a lack of mental capacity, and, as this is a general intent offense, in no way relieves him of culpability. *Johnson,* 14 F.3d at 769 (holding that district court properly excluded evidence of diminished capacity with respect to two counts alleging violations of 18 U.S.C. § 871 because each alleged a general intent offense).

Evaluating the evidence in the light most favorable to the prosecution, the Government proved the appellant's guilt beyond a reasonable doubt. The appellant's comments were not political in nature, nor was there any conversation about politics at the time appellant made them. Record at 76-77, 85. The appellant's threats were not truly conditional. Although his first threat was conditioned on his getting out of the pretrial confinement facility "right now," his later threat referred to his inevitable release from the brig.[13] Record at 77, 85. Finally, the appellant does

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[13] Even if the appellant's threats were conditional, they could still be considered "true threats." *See Kosma*, 951 F.2d at 554 (holding that defendant's specification of precise date, time and place for President's "21 gun salute" was a true threat); *United States v. Howell*, 719 F.2d 1258, 1260 (5th Cir. 1983) (concluding that the hospital patient's statement that he would kill the President if released was a true threat*); United States v. Callahan*, 702 F.2d 964, 965

not allege that he did not understand the meaning of the words he used or the concept of making a threat, nor is there any evidence in the record to suggest that the appellant's threats were the result of mistake, accident, coercion, duress, or some other innocent reason. Accordingly, we are fully satisfied that the evidence presented in this case was both legally and factually sufficient to sustain the military judge's finding of guilty.

Sentence Appropriateness

The appellant asserts that a sentence which includes a dishonorable discharge is inappropriately severe in his case for the following reasons: the appellant suffered from a diagnosed "Antisocial Personality Disorder" that resulted in a "pattern of disregard for, and violation of the rights of, others," and because the nature of his offenses do not warrant a dishonorable discharge. Appellant's Brief of 7. Accordingly, the appellant asks this Court for specific relief in regard to the dishonorable discharge awarded by the trial judge, and subsequently approved by the convening authority. *Id.* We disagree.

A general court-martial is free to impose any legal sentence that it determines is appropriate. *United States v. Turner,* 14 C.M.A. 435, 437, 34 C.M.R. 215, 217 (1964);

(11th Cir. 1983) (ruling that the letter offering to kill the President if Secret Service could make arrangements was a true threat). The language that formed the basis of the charge of threatening the President was taken from his later threat heard by OS2 Marnati, which was not conditional. Record at 84-85; Charge Sheet.

RULE FOR COURTS-MARTIAL 1002, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). Notwithstanding this fact, we "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and [determine], on the basis of the entire record, should be approved." Art. 66(c), UCMJ. "Generally, sentence appropriateness should be judged by individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 10 C.M.A. 102, 106-07, 27 C.M.R. 176, 180-81 (1959)(internal quotes omitted).

While we sympathize with the appellant's psychological condition, we do not believe that it in any way excuses or condones his behavior. Also, his diagnosed condition did not prevent him from fully appreciating the nature, quality, and wrongfulness of his misconduct. *See* Defense Exhibit G at 2 ¶ 5(c). The appellant's complete and utter contempt for, and disrespect towards, virtually every authority figure he encountered was seriously disruptive of good order, mission accomplishment, and effective discipline at both his command and within the Pretrial Confinement Facility where his behavior ultimately brought him. His actions were violent and threatening, and clearly calculated to generate anger and fear in his many victims. He also committed a violent battery upon a fellow Sailor, threatened serious bodily harm to a petty officer and her minor children, and willfully and violently damaged military property. Finally, he brought significant disruption to multiple Government organizations when he articulated a disturbing and credible verbal threat against the President of the United States, his Commander-in-

Chief. We believe these offenses are extremely serious and more than warrant the sentence the appellant was ultimately awarded, including the significant disapprobation associated with a dishonorable discharge.[14]

The appellant's argument appears to be more appropriately styled as a plea for clemency, which involves the act of bestowing mercy. Clemency is the sole prerogative of the convening authority. *United States v. Healy,* 26 M.J. 394, 395-96 (C.M.A. 1988); R.C.M. 1107(b). Nothing presented to us in this appeal suggests that the appellant's sentence is inappropriate. He was clearly afforded the individualized consideration contemplated in military law, and we find this assignment of error to be without merit.

Incorrect Advisement of Maximum Punishment

The appellant next asserts that the military judge erred in explaining during the providence inquiry what the maximum punishment was that the appellant could be subjected to as a result of his pleas of guilty to a variety of the offenses charged. In particular, the appellant complains that his pleas were not provident because he was not properly advised that a dishonorable discharge could be awarded. Appellant's Brief of 10; *See* R.C.M. 910(c)(1).

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[14] The appellant's service record also reflected that, prior to trial, he had received nonjudicial punishment on two prior occasions, and had a civilian conviction for battery. Prosecution Exhibits 4, 5, 6, and 7. *See also* Defense Exhibits C and D.

This argument is simply erroneous. Though there was initially some confusion over what the maximum punishment was, Record at 14-15, the appellant was ultimately correctly and properly advised that, ***based upon his pleas of guilty***, he could be awarded a bad-conduct discharge, confinement for 42 months, total forfeitures, and reduction to E-1. Record at 48. The appellant indicated his complete understanding of this maximum possible punishment, acknowledged having discussed it with his counsel, and stated that he still desired to plead guilty as he had. *Id.* Nothing more was required. The appellant's exposure to a dishonorable discharge (and additional confinement time) came strictly as a result of his ***subsequent*** conviction on three separate offenses to which he had pled "not guilty."[15]

In a mixed plea case such as this, we are aware of no requirement that a military judge must also explain the maximum possible punishment an accused ***might*** be subjected to if he is convicted ***additionally*** of any or all offenses to which he pled "not guilty." We see no sound rationale for establishing such a requirement, and refuse to do so in this case. This assignment of error is without merit.

Failing to Establish Counsel Qualifications

In his final, summary assignment of error, the

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[15] Specifically, appellant's subsequent conviction for communicating a threat in violation of Article 134, UCMJ -- which he pled "not guilty" to -- authorized the award of a dishonorable discharge.

appellant contends that the military judge erred by "not inquiring of the defense counsel's legal qualifications and status as to oath." Appellant's Brief of 12. This claim of error apparently arises as a result of the military judge and the detailed defense counsel failing to pay close attention as they waded through the prefatory portions of the standard trial script for a general court-martial. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), app. 8, at A8-2. Their colloquy on this issue proceeded as follows:

MJ: Lieutenant Casamento, please state for the record by whom you have been detailed, ***your legal qualifications and status as to oath***, and whether you have acted in any disqualifying manner.

DC: Yes, sir. I have been detailed to this court-martial by the Officer-in-Charge, Naval Legal Service Office, North Central Detachment, pursuant to the authority granted to him by Commanding Officer, Nation's Capitol. I have not acted in any manner which might tend to disqualify me in this court-martial . . . .

MJ: Thank -- thank you, Lieutenant.

Record at 3 (emphasis added).

While the military judge erred in failing to properly ascertain on the record the detailed defense counsel's legal qualifications and status as to oath, the facts of this case demonstrate that the error was harmless beyond a reasonable doubt. First, appellant's trial defense counsel, Lieutenant Casamento, was, in fact, properly qualified and sworn in accordance with Articles 27(b) and 42(a), UCMJ, at the time of the appellant's trial. *See* Government's

Motion to Attach of 9 Aug 1999, Enclosures 1 and 2. Additionally, the appellant has neither alleged nor demonstrated any prejudice whatsoever resulting from this obvious oversight. Although there was error, it was harmless and no relief is warranted.

Conclusion

Accordingly, we affirm the findings and sentence, as approved on review below.

Senior Judge DORMAN and Senior Judge TROIDL concur.

For the Court

CHRISTINE E. SHEEHY
Clerk of Court (Acting)

Supreme Court, U.S.
FILED
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CLERK

(2)

No. 01-190

In the Supreme Court of the United States

ROBERT B. OGREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
MICHAEL CHERTOFF
Assistant Attorney General
JOHN F. DE PUE
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

1900

QUESTION PRESENTED

Whether the offense of threatening the President, in violation of 18 U.S.C. 871, requires proof that the defendant intended to carry out the threat.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-17a) is reported at 54 M.J. 481. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 18a-41a) is reported at 52 M.J. 528.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on May 2, 2001. The petition for a writ of certiorari was filed on July 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following trial by a general court-martial and, in accordance with pleas of guilty, petitioner was convicted of three specifications of disrespectful language and one specification of disobedience of a noncommissioned officer (NCO), in violation of Article 91 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 891; one specification of willfully damaging military property, in violation of UCMJ Article 108, 10 U.S.C. 908; and one specification of assault and battery, in violation of UCMJ Article 128, 10 U.S.C. 928. Contrary to his pleas, petitioner was also convicted by the military judge of a third specification of disrespect to an NCO, in violation of UCMJ Article 91, 10 U.S.C. 891; one specification of communicating a threat, in violation of UCMJ Article 134, 10 U.S.C. 934; and one specification of communicating a threat to harm the President, in violation of 18 U.S.C. 871, as assimilated by 10 U.S.C. 934. Petitioner was sentenced to a dishonorable discharge, confinement for 12 months, total forfeiture of pay, and reduction to the lowest enlisted grade; the general court-martial convening authority suspended all confinement in excess of 200 days. The Navy-Marine Corps Court of Criminal Appeals affirmed, Pet. App. 18a-41a, as did the United States Court of Appeals for the Armed Forces, *id.* at 1a-17a.

1. On June 25, 1998, while petitioner was in pretrial confinement awaiting trial by a general court-martial on unrelated charges, petitioner threatened to harm a brig guard and her children. The following day, when petitioner was asked by the guard to sign a statement acknowledging inappropriate behavior, he repeated his threats, flooded his cell, and violently resisted when guards threatened to subdue him. When petitioner was

confronted by another brig guard about abusive comments that he had made to another detainee, he replied, "Fuck off" and added, "Fuck the Admiral, and fuck the President." He then added, "As a matter of fact, if I could get out of here right now, I would get a gun and kill that bastard." The guard construed the threat as one to kill the President and reported the matter to his leading chief petty officer. Pet. App. 3a, 20a-21a.

During the same morning, yet another brig guard inquired why petitioner was enraged and beating on the bulkheads of his cell. Petitioner responded, "I can't wait to get out of here man." When he was asked why, he added, "Because I'm going to find the President, and I'm going to shove a gun up his ass, and I'm going to blow his fucking brains out." The guard then asked what President petitioner was talking about; petitioner responded "Clinton, Clinton man! I'm going to find Clinton and blow his fucking brains out." The guard documented the incident, notified his superiors and telephoned the Secret Service, the agency within the federal government responsible for the protection of the President. Pet. App. 3a-4a, 21a-22a.

On July 22, 1998, Special Agent Douglas Cohen of the Secret Service interviewed petitioner, who admitted making the threatening statements concerning the President on the preceding day. When Agent Cohen asked petitioner whether he had any guns, petitioner responded, "No, but I can get them." Petitioner then inquired of Agent Cohen whether receipt of an other-than-honorable discharge would affect his ability to obtain weapons for hunting. He also told Cohen, however, that, when he made the threats, he "was blowing off steam and was expressing displeasure at his incarceration." In response to Agent Cohen's suggestion,

petitioner drafted a written apology to the President for making the threat. Pet. App. 22a.

2. Petitioner was subsequently charged with, *inter alia*, threatening the President, in violation of 18 U.S.C. 871, as assimilated by Article 134 of the UCMJ.[1] Section 871(a) provides in part as follows:

> Whoever knowingly and willfully * * * makes any * * * threat [to take the life of, to kidnap or to inflict bodily harm] against the President * * * shall be fined under this title or imprisoned not more than five years, or both.

During opening argument and in summation, petitioner's counsel argued that Section 871 was not intended by Congress to reach threats against the President made as part of an effort to antagonize corrections authorities; that no evidence existed that petitioner had taken any steps to effectuate his threat to kill the President; and that, under the totality of the circumstances, the threats could not be taken seriously. Tr. 50-51, 112-113. The prosecutor submitted a trial memorandum addressing the elements of a violation of that statute. It stressed that the fact-finder need only conclude that a reasonable person would foresee that the defendant's statements would be interpreted as a serious expression of intent to kill or inflict bodily harm

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[1] 10 U.S.C. 934 (Art. 134 UCMJ) provides in part: "Though not specifically mentioned in this chapter, all * * * crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court." Such crimes consist of noncapital offenses that violate federal law. See *Manual for Courts-Martial United States* ¶ 60.c, at IV-94 (2000 ed.).

upon the President, and that it was unnecessary to prove the defendant actually intended to carry out the threat. See Appellate Exh. IV. Before deliberating, the military judge stated that he would use the legal authorities that counsel for both sides had furnished him to explain the elements and the pertinent law concerning a violation of Section 871. Tr. 109. The judge subsequently returned a finding of guilty on the specification alleging a violation of that statute, without further particularizing the elements that he applied in his deliberations. Tr. 116-117.

3. On appeal before the Navy-Marine Court of Criminal Appeals (Navy Court), petitioner challenged the sufficiency of the evidence supporting his conviction for a violation of Section 871. Petitioner argued that the prosecution failed to establish that he had made a "true threat" against President Clinton, and that he had not acted willfully because he had not intended to inflict any harm against the President. See Pet. App. 23a-25a.

The Navy Court rejected those contentions and affirmed the conviction. The court concluded, with respect to the element of willfulness, that Section 871 "does not require that the defendant actually intend to carry out the threat," and that "the only requirement is that the accused intentionally and knowingly communicated his threat." Pet. App. 32a. As the court explained, "[i]f the speaker intended to make the statement, knew what the words meant, and reasonably should have foreseen that the statements he made would be understood as indicating a serious intention to commit the act, then this element [of willfulness] is satisfied." *Id.* at 32a-33a. The court further concluded that the evidence established beyond a reasonable doubt that petitioner "knowingly uttered the statement clearly understanding what his words meant," *id.* at

33a, and that a reasonable person would have foreseen that petitioner's statement would be construed as a serious threat against the President, *id.* at 34a.

4. The United States Court of Appeals for the Armed Forces affirmed. Pet. App. 1a-17a. Like the Navy Court, the court of appeals concluded that the element of willfulness under Section 871 is governed by an "objective" standard, which the court described as follows:

> The objective test requires only that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President.

Id. at 9a (internal quotation marks omitted).

The court emphasized that Section 871 is intended not just to protect the President's life and physical safety, but also to protect against harms associated with the threat itself. Pet. App. 11a. "This harm may occur at the moment a threat issues, *e.g.*, with a change in schedule or the dispatch of investigators." *Ibid.* By contrast, the court concluded, a subjective standard, which would require proof of the declarant's actual intent to effectuate the threat, would impose too high a threshold to accomplish the purposes of Section 871, for "it might not deter a subjectively neutral declarant from * * * disrupting the President's activities." *Ibid.*

The court further concluded that a rational trier of fact could conclude that petitioner should reasonably have foreseen that his threats against President Clinton would be understood as true threats, and not as

merely "a crude method of responding to confinement." Pet. App. 12a-13a. In particular, the court noted that, at a minimum, petitioner's second threatening statement was made after a night in which petitioner had the opportunity to reflect on his actions, and yet petitioner did not disavow his threat of the previous day. Nor, the court noted, were petitioner's words "uttered in a political context, intertwined with the substance of political protest or criticism, or an effort at sharing ideas." *Id.* at 13a.

ARGUMENT

The court of appeals correctly concluded that the offense of threatening the President in violation of 18 U.S.C. 871 does not require the prosecution to prove that the defendant actually intended to carry out his threat. Further review is therefore not warranted.

1. Petitioner contends (Pet. 4-5) that, by adopting an objective standard for determining whether a threat made against the President in violation of 18 U.S.C. 871 was willful, the court below effectively eliminated the element of *mens rea* from the statute. That contention is without merit.

Even without a requirement that the government prove that the defendant actually intended to carry out his threat against the President, the statute still contains a significant scienter requirement. The courts, including those adopting the rule that proof of actual intent to effectuate a threat is unnecessary, have long held that, for a threatening statement to be knowingly made, "the maker of it [must] comprehend[] the meaning of the words uttered by him," and must "voluntarily and intentionally utter[] them as the declaration of an apparent determination to carry them into execution." *Ragansky* v. *United States*, 253 F. 643, 645 (7th Cir.

1918). The statute thus requires a defendant to understand the significance of the words comprising the threat. See *United States* v. *Hoffman*, 806 F.2d 703, 707 (7th Cir. 1986) ("[T]o establish violation of sec. 871 the government must prove that the defendant understood the meaning of the words to be an apparent threat.") (internal quotation marks omitted), cert. denied, 481 U.S. 1005 (1987).

Petitioner therefore errs in relying (Pet. 4-5) on *Staples* v. *United States*, 511 U.S. 600 (1994), and *Liparota* v. *United States*, 471 U.S. 419 (1985), in contending that the "objective" test for willfulness strips Section 871 of a scienter element. In *Staples*, this Court construed 26 U.S.C. 5861(d) to require proof that the defendant knew the particular characteristics of a firearm that made it subject to regulation. 511 U.S. at 616-617. In *Liparota*, the Court construed 7 U.S.C. 2024(b)(1) to require proof that the defendant knew that he was acting in a manner not authorized by statutes or regulations governing the use of food stamps. 471 U.S. at 426-427. At most, those decisions indicate that a defendant must ordinarily understand the character of his actions to be found criminally liable. Neither decision is inconsistent with the lower courts' reading of Section 871. As the Navy Court explained, the statute requires proof that the defendant "intended to make the statement, [and] knew what the words meant." Pet. App. 32a.

The objective test adopted by the court of appeals is also fully consistent with Congress's intent in enacting Section 871, as demonstrated by statements of several sponsors of the legislation during floor debates. In the wake of a proposal to delete the word "willfully" from

the statute, Representative Volstead objected, and stated as follows:

> The word willfully adds an intention to threaten, and distinguishes a case [in which the defendant does not intend to convey any threat]. Without the requirement of willfulness, * * * a person might send innocently, without any intention to convey a threat at all, an instrument to a friend that contained a threat, and he would be guilty.

See *Rogers* v. *United States*, 422 U.S. 35, 45 (1975) (Marshall, J., concurring) (quoting 53 Cong. Rec. 9378 (1916) (statement of Rep. Volstead)) (internal quotation marks omitted). Representative Webb, who also opposed deletion of the term "willfully," added the following:

> I do not think we ought to be too anxious to convict a man who does a thing thoughtlessly. I think it ought to be a willful expression of an intent to carry out a threat against the Executive.

Rogers, 422 U.S. at 45-46 (Marshall, J., concurring) (quoting 53 Cong. Rec. at 9378 (statement of Rep. Webb)).

The objective test governing Section 871 comports with those expressions of the sponsors' intent. As Justice Marshall explained in his concurring opinion in *Rogers*, those statements suggest that the sponsors "intended the bill to require a showing that the defendant appreciated the threatening nature of his statement and intended at least to convey the impression that the threat was a serious one." 422 U.S. at 46. Because a defendant must be aware of the threatening character of his statements, and because those statements must be "true threats," see *Watts* v. *United*

States, 394 U.S. 705, 707-712 (1969) (per curiam), there is little danger that a defendant can be convicted if he merely acts "thoughtlessly" and without intending to convey a threat at all.

Justice Marshall expressly rejected, however, a construction of Section 871 that would require proof of an express intention to carry a threat into effect:

> A threat made with no present intention of carrying it out may still restrict the President's movements and require a reaction from those charged with protecting the President. Because § 871 was intended to prevent not simply attempts on the President's life, but also the harm associated with the threat itself, I believe that the statute should be construed to proscribe all threats that the speaker intends to be interpreted as expressions of an intent to kill or injure the President.

Rogers, 422 U.S. at 47 (Marshall, J., concurring). See also *Roy* v. *United States*, 416 F.2d 874, 877 (9th Cir. 1969) (explaining that Section 871 was designed in light of the detrimental effect of a threat against the President whether or not the person actually intends to carry out the threat); *United States* v. *Kosma*, 951 F.2d 549, 556 (3d Cir. 1991) (same). The test adopted by the court of appeals serves Congress's objectives in Section 871 by deterring true threats that have the potential to disrupt the President's functions and restrict his movements.

2. Petitioner also argues (Pet. 5-6) that this Court should grant review to resolve a conflict among the circuits on whether Section 871 requires proof of the defendant's intent actually to carry out a threat. That purported conflict, however, does not warrant this Court's review.

As the court of appeals observed (Pet. App. 8a-9a), the majority of the courts of appeals have ruled that the "willfulness" element of Section 871 does not require proof that the defendant intended to carry out the threat, but only that he intentionally made a statement that a reasonable person would foresee being interpreted as a serious expression of an intention to kill or harm the President. See *United States* v. *Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997); *United States* v. *Johnson*, 14 F.3d 766, 768-769 (2d Cir.), cert. denied, 512 U.S. 1240 (1994); *United States* v. *Kosma*, 951 F.2d 549, 557 (3d Cir. 1991); *United States* v. *Howell*, 719 F.2d 1258, 1260 (5th Cir. 1983) (per curiam), cert. denied, 467 U.S. 1228 (1984); *United States* v. *Miller*, 115 F.3d 361, 364 (6th Cir.), cert. denied, 522 U.S. 883 (1997); *United States* v. *Hoffman*, 806 F.2d 703, 707 (7th Cir. 1986); *United States* v. *Manning*, 923 F.2d 83, 85-86 (8th Cir.), cert. denied, 501 U.S. 1234 (1991); *Roy* v. *United States*, 416 F.2d 874, 877 (9th Cir. 1969); *United States* v. *Welch*, 745 F.2d 614, 619-620 (10th Cir. 1984), cert. denied, 470 U.S. 1006 (1985); *United States* v. *Callahan*, 702 F.2d 964, 965 (11th Cir.) (per curiam), cert. denied, 464 U.S. 840 (1983); *Watts* v. *United States*, 402 F.2d 676, 678-682 (D.C. Cir. 1968), rev'd on other grounds, 394 U.S. 705 (1969).[2]

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[2] *United States* v. *Frederickson*, 601 F.2d 1358, 1363 (8th Cir.), cert. denied, 444 U.S. 934 (1979), on which petitioner also relies (Pet. 6), is not contrary to the majority view. In that case, the district court's jury instructions adopted the construction of the willfulness requirement enunciated by Justice Marshall in his concurring opinion in *Rogers*. The court of appeals simply held that, as no objection was made to the instruction, "the *Rogers* view of the statute constitutes the law of this case, against which we measure the sufficiency of the evidence." As explained above (p. 10, *supra*), Justice Marshall's concurring opinion in *Rogers*

The opinion of a divided panel of the Fourth Circuit in *United States* v. *Patillo*, 431 F.2d 293 (1970), vacated on rehearing en banc, 438 F.2d 13 (1971), stands alone in ruling to the contrary. In that case, the panel apparently adopted a subjective test:

> The threat can form a basis for conviction under the terms of Section 871(a) only if made with a present intention to do injury to the President. Such intent may take the form of a bad purpose to personally do harm to the President or to incite some other person to do the injury.

431 F.2d at 297-298 (footnote omitted). The panel majority reversed the defendant's conviction because the district court had only required proof that the defendant knowingly and voluntarily made statements as a declaration of an apparent determination to carry them out. *Id.* at 298.

The holding of the divided panel in *Patillo* does not, however, constitute an accurate reflection of the views of the Fourth Circuit with respect to the element of willfulness under 18 U.S.C. 871. After granting the government's petition for rehearing in that case, the en banc court modified the panel's purely subjective test requiring an intent to injure the President. *United States* v. *Patillo*, 438 F.2d 13 (4th Cir. 1971) (en banc). Relying on the Ninth Circuit's decision in *Roy*, *supra*, the en banc court observed that, "even though the maker of the threat does not have an actual intention to assault the President, an apparently serious threat may cause mischief or evil toward which [Section 871] was in

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expressly rejected a construction of Section 871 that would require proof of an actual subjective intent to effectuate a threat against the President.

part directed," and that, accordingly, "[t]he statute does not require that the defendant actually intend to carry out the threat." *Patillo*, 438 F.2d at 15 (quoting *Roy*, 416 F.2d at 877-878). The en banc court then expressed agreement with the reasoning of other courts of appeals that the statute "was designed to prevent a secondary evil other than actual assaults upon the President or incitement to assault the President," and that "it is a legitimate area of congressional concern to prevent and make criminal disruption of presidential activity and movement that may result simply from publication of an apparent threat upon the President's life." The court stated that, "[w]hen a threat is published with an intent to disrupt presidential activity, we think there is sufficient mens rea under the secondary sanction of the statute." *Id.* at 15-16.

Purporting to clarify an "apparent misunderstanding of [its] prior panel decision," the en banc court further stated that "an essential element of guilt [of Section 871] is a present intention either to injure the President, or incite others to injure him, *or to restrict his movements.*" *Patillo*, 438 F.2d at 16 (emphasis added). The court also explained that the "latter intention [could be established] from the nature of the publication of the threat, *i.e.*, whether the person making the threat might reasonably anticipate that it would be transmitted to law enforcement officers and others charged with the security of the President." *Ibid.*[3]

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[3] Like the panel, however, the en banc court reversed the defendant's conviction. The en banc court explained that the defendant's conviction could not be sustained on the basis of an "intention to disrupt" as he "was not prosecuted on a theory of intention to disrupt presidential activity." *Patillo*, 438 F.2d at 16.

As Chief Judge Haynsworth observed in his dissent, the distinction between the test for willfulness adopted by the en banc majority (whether the maker of a threat might reasonably anticipate that it would be transmitted to law enforcement or security personnel) and that adopted by other circuits (whether the threat amounted to the declaration of an apparent determination to carry the threat into execution) may be only "a tempest of semantics," for both standards involve "an objective standard for measuring the defendant's intention." *Patillo*, 438 F.2d at 16 (Haynsworth, C.J., dissenting). Such semantic distinctions are not of sufficient moment to merit further review by this Court.

Moreover, in the 30 years since the decision in *Patillo*, every other court of appeals that has addressed the issue has adopted the objective standard for willfulness under Section 871. See p. 11, *supra*.[4] Although the Fourth Circuit has not had occasion since *Patillo* to reconsider its position, it may well do so when the opportunity arises, given the overwhelming weight of more recent contrary authority from the other circuits. This Court has denied several petitions for certiorari

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[4] Indeed, in the wake of the en banc decision in *Patillo*, the Fourth Circuit appears to have abandoned entirely the view that an intent to kill or harm the President is an essential element of a violation of Section 871. In its unpublished decision in *United States* v. *Weaver*, No. 96-4708, 1997 WL 787132 (Dec. 24, 1997), the court rejected the defendant's argument that the district court improperly denied his motion for a judgment of acquittal because of insufficient evidence of such an intent. The court observed that the statute is violated when a defendant intends, through threats, to restrict the Presidents's movements, an element that may be inferred by reference to "[w]hether the person making the threat might reasonably anticipate that it would be transmitted to law enforcement officers and others charged with the security of the President." *Id.* at *1 (quoting *Patillo*, 438 F.2d at 16).

based on the claimed conflict with *Patillo*.[5] There is no reason for a different result here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
MICHAEL CHERTOFF
Assistant Attorney General
JOHN F. DE PUE
Attorney

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[5] See *Johnson* v. *United States*, 512 U.S. 1240 (1994); *Smith* v. *United States*, 502 U.S. 852 (1991); *Manning* v. *United States*, 501 U.S. 1234 (1991); *Herman* v. *United States*, 498 U.S. 944 (1990); *Callahan* v. *United States*, 464 U.S. 840 (1983).